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SUPREME COURT, U.S.

No. 98-132

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

WESTERN RESOURCES, INC., *Petitioner*,

v.

STATE OF CALIFORNIA, et al., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit properly held that the Eleventh Amendment does not bar a suit in federal court against a receiver that was appointed by a state court to administer a testamentary trust, when the receiver is sued solely in its representative capacity to establish the liabilities of the trust to clean up contaminated groundwater?

LIST OF PARTIES

Appellants:

Western Resources, Inc., as the Receiver of the Victor Muscat Testamentary Trusts

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
No. 98-132

WESTERN RESOURCES, INC., *Petitioner*,

v.

STATE OF CALIFORNIA, et al., *Respondent*.

Respondent, State of California, on behalf of the California Department of Substances Control (State of California), submits this opposition to the Petition for Writ of Certiorari (Petition) filed by Western Resources, Inc., the receiver of the Victor Muscat Testamentary Trusts (Receiver). The Petition seeks review of a decision of the Ninth Circuit Court of Appeals upholding the substitution of the Receiver, in place of the Trustees of the Victor Muscat Testamentary Trusts (Muscat Trusts), into a district court action brought by the State of California. The Receiver asserts that it is an arm of the Connecticut Court that appointed it to act as receiver of the Muscat Trust assets, and therefore is an arm of the State of Connecticut. Accordingly, the Receiver asserts that it is entitled to the State of Connecticut's Eleventh Amendment immunity from suit in federal court. The district court and the Court of Appeals rejected the Receiver's arguments.

The Petition fails to present any conflict between federal circuit courts or with applicable decisions of this Court. The Petition raises only vague speculation that the issue will arise in future cases, and does nothing more than express the Receiver's dissatisfaction with the Court of Appeals' legal ruling. The State of California respectfully requests that this Petition be denied in its entirety.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 138 F.3d 784 (9th Cir. 1998). A copy is attached to the Petition at Appendix A, page 1a - 8a.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on March 9, 1998. This Court has jurisdiction under section 28 U.S.C. section 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The Eleventh Amendment to the United States Constitution is pertinent to this Petition. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The following statutory provisions are pertinent to this Petition: 42 U.S.C. sections 9607(a) and 9613(b).

42 U.S.C. section 9607. Liability:

[CERCLA § 107]

(a) Covered persons; scope; recoverable costs and damages . . .

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

. . .

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

42 U.S.C. section 9613. Civil proceedings:

[CERCLA § 113]

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of

this section, the Fund shall reside in the District of Columbia.

California Civil Code section 3494. [Public actions]:

A public nuisance may be abated by any public body or officer authorized thereto by law.

STATEMENT OF THE CASE

This case arises out of the contamination of groundwater in Chico, California with hazardous chemicals, including trichloroethylene,[1/] that was caused by Victor Industries, a corporation owned by Victor Muscat and then, after Victor Muscat's death, owned by the Victor Muscat Testamentary Trusts. The case was initiated in 1993 by the State of California as a cost recovery action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. sections 9601 et seq., with pendent state claims for injunctive relief under the California Health and Safety Code and California public nuisance laws. The complaint named as defendants the Trustees of the Muscat Trusts, in their representative capacity as Trustees.[2/] While the action was pending, one of the Trustees died and the others sought to resign. In 1995, the Connecticut Superior Court, which had jurisdiction over the Trusts, removed the Trustees and appointed Western Resources, Inc. as receiver of the Muscat Trusts. Because the Trustees no longer had any control over the

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1. Trichloroethylene is a carcinogen. 138 F.3d 772, 775 (9th Cir. 1998).

2. The complaint also names the Trustees as defendants in their individual capacities as owners and/or operators of a facility under CERCLA. These claims are not relevant to this appeal.

assets of the Trusts, the district court substituted the Receiver as a defendant in this action, in its representative capacity as receiver of the Muscat Trusts. The Receiver opposed the substitution on the grounds that, under the Eleventh Amendment, its appointment divested the federal courts of their jurisdiction over the State of California's CERCLA claims, and pendent state claims, and made it impossible for the State of California to seek this court's determination that it is entitled to recover the costs of cleaning up the contamination from the Muscat Trust. The State's action, however, seeks to establish the liability of the Muscat Trusts for the pollution that was caused by activities that occurred before the Receiver was appointed. The action does not seek to establish liability arising from any actions taken or authorized by the Receiver. The action seeks to establish liabilities to be satisfied out of the assets of the Muscat Trusts.[3/] It does not seek to impose liabilities that the Receiver personally (i.e., using its own assets), or the State of Connecticut, would be legally obligated to pay.

The Receiver appealed the district court's order substituting the Receiver into the action in place of the Trustees. The Court of Appeals affirmed and the Receiver filed a petition seeking review by this Court.

A. The District Court Proceeding

On April 12, 1993, the State initiated this action in federal district court seeking cost recovery under CERCLA and injunctive relief under state laws. The action seeks to impose liability for contamination of groundwater at and from two hazardous substance sites in Chico, California, known as the 20th Street Site and the Chico Airport Site. Victor Industries operated at these sites for years, dumping

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3. These assets may include insurance policies issued to Victor Industries that potentially cover the claims alleged in this action.

large quantities of contaminants to the soil. The complaint alleged that the Muscat Trusts are liable for the groundwater contamination caused by Victor Industries and named as defendants Albert Campbell, Charles Tackman, and Robert Tiberiis, as Trustees of the Muscat Trust (Trustees) and as Executors of the Estate of Victor Muscat (Executors).[4/].

In August 1993, the State prevailed on a partial summary judgment motion for a permanent injunction against the Trustees of the Muscat Trusts and Executors of the Muscat Estate to abate a nuisance caused by groundwater contamination at the 20th Street Site in Chico.[5/] The litigation is ongoing to establish liability of other defendants for contamination at the 20th Street Site, to establish liability of the Muscat Estate, the Muscat Trusts and others for groundwater contamination at the Chico Airport Site, and to determine the amount for which defendants are liable to the State for its costs of
investigation and oversight of the contaminated sites.

On February 14, 1995, the Connecticut Superior Court, which had jurisdiction over the Muscat Trusts, removed the remaining Trustees and appointed Western Resources, Inc. as receiver of the Victor Muscat Testamentary Trusts "to administer the Trusts." CR 421, Exh.A, ER Vol.1. Western Resources is a Delaware corporation with offices located in New York. CR 421, Exhibit A and Exhibit B,

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4. Charles Tackman subsequently died and the personal representatives of his estate were substituted into the action.

5. The Trustees and Executors filed an appeal of the injunction to the Ninth Circuit Court of Appeals. The Petitioner in this action, Western Resources, Inc., intervened in the appeal, seeking reversal of the injunction. The Ninth Circuit upheld the district court's issuance of the injunction in *California v. Campbell*, 138 F.3d 772 (9th Cir. 1998). The Executors of the Muscat Estate filed a Petition for Certiorari, Case No. 97-1996, which is still pending.

ER Vol.1. After the Receiver was appointed, the work being conducted by consultants to abate the nuisance at the 20th Street Site ceased. These consultants had been retained by the Trustees of the Muscat Trusts to conduct this work, in accordance with the district court's injunction.

In April 1995, at the Receiver's request, the Connecticut Court issued an order addressing this federal action. The Connecticut Court's order stated: "This Court has not granted permission to anyone, including the State of California, to sue the receiver, to make any attempt to substitute the receiver as a party in any legal action or to attempt to hold the receiver liable for any orders entered against the Muscat Trusts." CR 421, Exh. B, ER Vol. 1, ¶ 3.[6]

In June 1995, the State of California requested the Connecticut Court's permission to substitute the receiver into the pending federal action in place of the Trustees. CR 305, p.6, ¶ (3), ER Vol.1. The State of California also asked the Connecticut Court to order the Receiver, on behalf of the Muscat Trusts, to comply with the injunction requiring abatement of a nuisance at the 20th Street Site. Id. The Connecticut Court issued an order in October 1995 stating that it reserves decision on these matters. CR 307, Exh. C, ¶ (2), Plaintiff's ER, Vol. 1. To date, over three years later, the Connecticut Court has not issued any ruling on the State of California's requests.

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6. The Connecticut Court did authorize the Receiver's limited participation in the federal action, stating: "To the extent that the Muscat Trusts are presently parties in any actions in which the Muscat Trusts are seeking affirmative relief or affirmatively pursuing an appeal, the receiver is permitted to take the minimal steps necessary to avoid dismissal of any such claims or appeals." CR 421, Exh. B, Vol. 1, ¶ 4.

After waiting a substantial period of time for the Connecticut court to act, on March 19, 1996, the federal district court issued an order substituting Western Resources, Inc., in its capacity as receiver of the Muscat Trusts, into this action in place of the Trustees. Petition, Appendix A at 16a - 18a. The Receiver, Western Resources, filed a motion in the district court seeking dismissal of the State of California's claims against it, in part based on Eleventh Amendment immunity. After this motion was denied, the Receiver filed a motion for summary judgment again asserting that the Eleventh Amendment bars the State's claims.[7] *Id.* at 19a - 22a. The district court denied the motion for summary. *Id.* at 57a - 58a.

B. Proceedings Before the Ninth Circuit Court of Appeals

On February 26, 1997, the Receiver filed an interlocutory appeal of the district court's order denying the Receiver's motion for summary judgment and ruling that the Eleventh Amendment of the United States Constitution did not bar substitution of the Receiver into this federal action as a defendant. The Court of Appeals concluded that it had appellate jurisdiction to review this interlocutory ruling and affirmed the district court's order ruling that the Eleventh Amendment does not bar substitution of the Receiver into this action. Petition, Appendix A at 5a - 8a.

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7. Although Petitioner asserts that the State of California improperly sought to substitute it into this action without the Connecticut Court's permission, Petition at 5, n.4, this was not a basis for Petitioner's appeal to the Ninth Circuit, nor could it be grounds for an interlocutory appeal. While the State of California believes that the substitution was not improper for this reason, and the district court agreed, this issue is irrelevant to the Eleventh Amendment defense that is raised in the Petition.

On appeal, the Receiver asserted that, as a receiver appointed by the court, it is an "arm" of the Connecticut Court and therefore an arm of the State of Connecticut. As an arm of the State of Connecticut, the Receiver argued that it is entitled to Connecticut's Eleventh Amendment immunity.

The Court of Appeals held that the Receiver is not entitled to Eleventh Amendment immunity in this case because California's action is not "against" a state or an arm of the state, as required for the Eleventh Amendment to apply. Petition, Appendix A at 6a. The Eleventh Amendment provides that the jurisdiction of the federal courts "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States." U.S. Const. amend. XI.[8/] The Receiver is named as a defendant in this case only because it is responsible for the assets of the Muscat Trusts, the party allegedly liable for the pollution in California. Appendix A at 6a-7a. The Court of Appeals reasoned that California's suit is not against the Receiver, Western Resources, because it "does not seek to determine Western Resources' rights and liabilities. It does not seek to recover Western Resources's assets, but rather the assets over which Western Resources is the receiver." Id. at 7a-8a.

In support of its decision, the Court of Appeals noted that cases that recognize an entity's Eleventh Amendment immunity involve a determination of the rights or liabilities *of the entity asserting immunity*. Appendix A at 7a. The court referred to *Franceschi v. Schwartz*, 57 F.3d 828 (9th Cir. 1995) (suit against municipal court and court

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8. The court recognized that it is settled law that actions "against one of the United States" include certain actions "against state agents and state instrumentalities." Appendix A at 6a, *citing*, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, ---, 117 S.Ct. 900, 903 (1997).

commissioner to determine whether actions of municipal court commissioner violated civil rights); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987) (suit against state court to determine whether court and jury commissioners were liable for failure to provide sign-language interpreters and whether court must provide interpreters in the future); and *O'Connor v. Nevada*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982) (suit against State of Nevada, Supreme Court of Nevada and State Bar of Nevada to determine whether State Bar and Supreme Court violated civil rights laws). The Court distinguished these cases, which address the alleged liability of the state or state entity, from cases where the Eleventh Amendment does not apply because "the entity invoking the immunity is only sued in its *representative capacity*." Appendix A at 7a, *citing*, *Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of Cal.*, 656 F.2d 491 (9th Cir. 1981) (holding that action naming state entity as defendant did not constitute action against the state because the state entity was sued in its representative capacity as receiver) and *Finkielstain v. Seidel*, 857 F.2d 893 (2d Cir. 1988) (same). Accordingly, the Court of Appeals affirmed the district court's denial of Petitioner's motion for summary judgment.

REASONS FOR DENYING WRIT

The Petition should be dismissed in its entirety. There is no conflict between the circuits; there is no conflict with any Supreme Court decisions; and the Receiver only asks the Court to speculate that this issue will arise in future cases. The Receiver's only grounds for certiorari is its dissatisfaction with the Court of Appeals' ruling. The Court of Appeals decision is correct and, in any event, the Receiver's disagreement with it does not warrant this Court's review.

I.

THE PETITION DOES NOT PRESENT ANY CONFLICT BETWEEN THE CIRCUITS

The Petition should be denied because the legal issue presented is not the subject of a conflict between court of appeals decisions. Rather, all three court of appeals that have addressed a claim to Eleventh Amendment immunity by a receiver sued in its representative capacity have rejected the claim. The decisions in these cases are entirely consistent with the decision in this case. In *Excess and Casualty Reinsurance Commissioner of the State of California*, 656 F.2d 491 (9th Cir. 1981), the Ninth Circuit denied Eleventh Amendment immunity because it examined the "essential nature and effect of the action" against the Florida Department of Insurance and found no impact on the state's sovereignty because the Department was not sued in its sovereign capacity but, rather, as receiver of an insurance company. In *Foremost Guaranty Corp. v. Community Savings and Loan, Inc.*, 826 F.2d 1383, 1387 (4th Cir. 1987), and *Finkielstain v. Siedel*, 857 F.2d 893, 895-896 (2d Cir. 1988), the Fourth Circuit and the Second Circuit denied Eleventh Amendment immunity to a Maryland agency that was sued in its limited capacity as receiver for a bank because the action did not allege any wrongdoing by the state agency, no relief from the state agency was requested, and the agency's only involvement was in its capacity as receiver of the bank.[9/]

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9. The Receiver argues that the court of appeals decisions in *Excess and Casualty Insurance* and *Finkielstain* are distinguishable from this case and therefore the outcome in this case should have been different from those cases. Petition at 11-12. The reasons the Receiver offers for distinguishing the decisions are unconvincing and based on a selective reading of the cases. *Id.* In *Excess*, the court found no impact on the

Several district court decisions also reject a receiver's claim to Eleventh Amendment immunity. *See*, *State of North Carolina v. Alexander & Alexander Services, Inc.*, 711 F.Supp. 257, 262-63 (E.D.N.C. 1989) (counterclaims against state Commissioner of Insurance solely in his representative capacity as rehabilitator of insurance company are not claims against "state" for purposes of Eleventh Amendment because no wrongdoing by Commissioner is alleged and no relief from Commissioner is sought); *Skandia America Reinsurance Corp. v. Schenck*, 441 F.Supp. 715, 722 (S.D.N.Y. 1977) (suit against Superintendent of Insurance as liquidator of company not barred by Eleventh Amendment because no impact on public fisc or on property state has claim to); *Merrill Lynch, Pierce, Fenner & Smith v. Cavicchia*, 311 F.Supp. 149, 156-58 (S.D.N.Y. 1970) (action against receiver appointed by state court not barred by Eleventh Amendment where action has no impact on state revenues, state property, state contracts, or state political activity and therefore does not challenge state's sovereignty).

There are simply no court of appeals or district court decisions that reach a contrary result and grant Eleventh Amendment immunity to a state court-appointed receiver sued in its representative capacity. Thus, there is no conflict to warrant this Court's review. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 700 (1982) (certiorari granted because decision

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state's sovereignty and denied immunity because the action did not seek to recover damages from the state treasury and did not challenge any functions of the state government. 656 F.2d at 497-498. The court's analysis in *Finkielstain* did not turn on the fact that a state agency had instituted the receivership and taken control of the bank's assets, rather than a state court, as suggested by the Receiver. Contrary to the Receiver's assertion, the court of appeals decisions are consistent in their determination to reject the claim of a receiver sued in its representative capacity to Eleventh Amendment immunity and in their reasons for doing so.

directly conflicts with decision of another court of appeals); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted to resolve conflict among circuits on question).

II.

THE PETITION DOES NOT PRESENT A CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The Receiver attempts to portray the Court of Appeals' decision as "contrary to the scope and purpose ascribed to the Eleventh Amendment by this Court." Petition at 10. In support of its argument, the Receiver cites *Seminole Tribe of Florida v. State of Florida*, 517 U.S. 44, 58 (1996) for the proposition that the Eleventh Amendment does not only prevent federal court judgments that the state must pay, but "it also serves to avoid the indignity of subjecting a state to the coercive process of judicial tribunals . . ." The Receiver also cites this Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). In *Hess*, this Court found that the Port Authority Trans-Hudson Corporation was not a state agency entitled to Eleventh Amendment immunity because suit against it did not pose a genuine threat to state dignity or to the state treasury. *Hess* at 47-51.

These decisions do not address the issue in this case -- whether the Eleventh Amendment bars suit against a state court-appointed receiver, in its representative capacity, to establish legal liabilities and obligations of the entity in receivership. The Court of Appeals correctly held that the Eleventh Amendment does not bar such an action and neither *Seminole* nor *Hess* dictate a different outcome. In fact, *Hess* strongly supports the Court of Appeals' decision in this case. *Hess* recognized that "prevention of federal-court judgments

that must be paid out of a State's treasury" is "the impetus for the Eleventh Amendment" and accordingly courts have recognized "the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." 513 U.S. at 48. In this action, the rights and liabilities of the state or the state treasury are not at issue, but rather, the action involves the liabilities and the assets of a private trust which is being represented by a receiver. The job of the receiver is to administer the private assets of a deceased individual, Victor Muscat, who was liable under federal and state law for pollution of groundwater in Chico, California.

Moreover, the Court of Appeals' decision is consistent with this Court's decision denying Eleventh Amendment immunity to a state court-appointed receiver in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 73-74 (1939), *reh'd denied*, 309 U.S. 693 (1940) (subject of federal action is rights of private parties to a corporation's stock and therefore the State of Washington has no interest and no infringement of Eleventh Amendment occurs). The Receiver's attempt to create a conflict with a decision of this Court fails.

III.

MERE SPECULATION THAT AN ISSUE WILL ARISE AGAIN DOES NOT JUSTIFY GRANTING CERTIORARI

The Receiver asks the Court to speculate that the Court of Appeals' decision will have increasing importance because cases raising the issue presented in the Petition will grow in number. Petition at 15. Whether this will occur, and whether the courts of appeals' decisions on the issue will conflict, is unknown. The fact that three circuits have already rejected a receiver's claim to Eleventh Amendment immunity, see above at p. 11, makes it highly speculative

that a conflict will occur. Even if the issue can reasonably be expected to arise in the future, it should be left to further litigation in the courts of appeals where a consensus may develop that alleviates any need for this Court's review. Speculation that an issue will have increasing importance is not sufficient to justify granting certiorari.

IV.

THE RECEIVER'S DISSATISFACTION WITH THE RULING OF THE NINTH CIRCUIT IS NOT GROUNDS FOR ISSUANCE OF THE PETITION

The only basis for this Petition is the Receiver's dissatisfaction with the legal rulings of the district court and the Court of Appeals. Petition at 8-14. The Receiver argues that the Court of Appeals "erroneously affirmed" the district court because "the Eleventh Amendment bars California's suit for lack of jurisdiction." Petition at 8. The Receiver further argues that "California's suit against WRI cannot be permitted to proceed because . . . WRI is acting as an 'arm' of the Connecticut Superior Court, and, therefore, the District Court lacks jurisdiction as a matter of law." Petition at 12. The Court of Appeals correctly rejected these legal arguments. Not only was the Court of Appeals' decision correct, the Receiver's disagreement with that decision is not sufficient to warrant review by this Court. *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974) (this Court's discretionary review depends on numerous factors other than perceived correctness of judgment the Court is asked to review).

In an attempt to craft a reason justifying this Court's review, the Receiver asserts that the Court of Appeals based its decision on an incorrect assumption: "that California can recover from WRI 'only in WRI's representative capacity.'"

Petition at 9, quoting Appendix A at 7a.[10/] In fact, this assumption is absolutely correct. California has not sued the Receiver individually, but only seeks relief against the Receiver in its representative capacity, as the entity appointed to administer the Muscat Trusts. California seeks a determination of the environmental obligations under CERCLA and applicable state laws of the Muscat Trusts, which can now only act through the Receiver. There is no basis for the Receiver's assertion that the Court of Appeals was incorrect.

The Receiver also argues that the Court of Appeals' decision was wrong because California's action seeks injunctive relief in addition to a money judgment. The court of appeals was aware that this action includes claims for injunctive relief.[11/] Regardless of whether the action seeks a money judgment or injunctive relief, the relevant question is against whom is the relief sought? No relief is sought in this action from the Receiver itself. Petition, Appendix A at 6a-8a. An injunction requiring the Receiver, in its representative capacity as the receiver of the Muscat Trusts, to clean up groundwater contamination in California does not impose an obligation on the Receiver individually or on the

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10. The Receiver is quoting from the court of appeals' statement that: "[Conversely], the Eleventh Amendment does not apply in cases where the entity invoking the immunity is sued only in its *representative capacity*." Appendix at 7a (citations omitted).

11. The court's decision cites to the companion case of *California v. Campbell*, in which the same panel that decided this appeal upheld the district court's injunction requiring the Muscat Trust and Muscat Estate to abate the nuisance caused by groundwater contamination in California. That decision was published at 138 F.2d 772 (9th Cir. 1998) and is the subject of a pending petition for certiorari in Case No. 97-1996.

State of Connecticut.[12/] The Court of Appeals correctly rejected the Receiver's claim to immunity, holding that "[t]he Eleventh Amendment only applies in cases where the courts are asked to determine the rights and liabilities of the entity invoking the immunity." *Id.* at 7a. It does not apply when the receiver is sued only in its representative capacity in an action to determine the rights or liabilities of the entity in receivership. *Id.* at 7a and 3a.

This holding is consistent with other court of appeals decisions. *See*, *Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of California*, 656 F.2d 491, 497 (9th Cir. 1981) (action naming state entity in its representative capacity as receiver is not barred by Eleventh Amendment because action does not seek recovery from state treasury or seek to compel or forbid any action by the state); *Foremost Guaranty Corp. v. Community Savings and Loan, Inc.*, 826 F.2d 1383, 1387 (4th Cir. 1987) (rejecting claim of Maryland Deposit Insurance Fund to Eleventh Amendment immunity because Fund was before the court solely as Community Savings and Loan's receiver); *Finkielstain v. Seidel*, 857 F.2d 893 (2d Cir. 1988) (same).

Thus, not only is the Court of Appeals decision absolutely correct, the Receiver's disagreement with the court's holding does not warrant this Court's review.

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12. California acknowledges that pursuant to the Connecticut Court's orders, expenditure of funds in the Muscat Trust receivership estate for cleanup must be authorized by the Connecticut Court and, therefore, the Connecticut Court must authorize expenditures of Muscat Trust assets for the purpose of compliance with an injunctive relief order in this action. (CR 307, Exh. C, ¶¶ (7) and (8), Plaintiff's ER, Vol.1). This, however, is separate from the issue of whether the Receiver is protected by the State of Connecticut's immunity under the Eleventh Amendment from litigation in federal court to determine the Muscat Trust's liabilities and obligations for pollution in California under CERCLA and applicable state laws.

CONCLUSION

The Petition should be denied because it fails to present any conflict between circuits, fails to present a conflict with applicable decisions of this Court, only asks the Court to speculate that the issue will be raised in future cases, and only raises Petitioner's dissatisfaction with the Court of Appeals' legal ruling. Thus, this Court's review is not warranted.

Dated: August 19, 1998.

Respectfully submitted,

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